Phileo Allied Securities Sdn Bhd v Yong Keong Sheng & Anor

HIGH COURT (SHAH ALAM) — SUIT NO 22–98 OF 1998
SURAYA OTHMAN J
9 JULY 2010

Contract — Formation — Contract to operate trading account — Whether first defendant appointed plaintiff as his agent for sale and purchase of shares on KLSE — Whether first defendant legally responsible for losses arising from trading account — Whether plaintiff proven its case on balance of probabilities

Evidence — Adverse inference — Failure to call witness — Plaintiff's failure to call remisier who was in charge of first defendant's trading account — Whether adverse inference ought to be drawn — Evidence Act 1950 s 114(g)

Evidence — Documentary evidence — Admissibility of — Contract notes and contra statements tendered without calling relevant witnesses — Whether documents inadmissible as evidence

Evidence — Witness — Inconsistencies in testimonies — Whether evidence of plaintiff's main witness inconsistent with plaintiff's pleadings and contemporaneous documents tendered — Effect of

The first defendant had signed an application form to open an individual account with the plaintiff to enable him to receive shares in Espirit Group Bhd ('Espirit'), which shares were to be given to him as an employee of Espirit. The plaintiff alleged that the first defendant had appointed it as his agent for the sale and purchase of shares on the KLSE and that the plaintiff had sustained contra losses amounting to RM4,318,235.98 from the purchase and disposal of shares for the first defendant. The plaintiff instituted the present action against the first defendant and the second defendant, his guarantor, for these contra losses and interest. However, before the trial proceeded the plaintiff withdrew its claim against the second defendant. In his defence the first defendant submitted that he had only opened an account with the plaintiff to receive the shares in Espirit and that he had not at any time entered into any contract with the plaintiff to buy and sell any shares on the KLSE. He also denied giving any instructions or orders to the plaintiff's remisier or agent to purchase any shares for him and of receiving any contract notes, contra statements or statement of accounts, which the plaintiff maintained were sent by post to him. The plaintiff

relied on a copy of a letter dated 19 November 1997 purportedly signed by the first defendant authorising two persons ('the third parties') to utilise the first defendant's trading account but the first defendant denied signing this letter. The central issue for determination in this case was whether the plaintiff had on a balance of probabilities proven that the first defendant had authorised or instructed it to use the share trading account opened in his name to buy the shares, which were the subject matter of this claim.

Held, dismissing the plaintiff's claim with costs:

(1) While there was evidence to show that the first defendant had signed an application form to open an individual account with the plaintiff to enable him to receive the shares in Espirit, this was insufficient to conclude that he therefore undertook the entire liability for the purchase and sale of the shares undertaken by the remisier or third parties. This is so since the plaintiff did not call or make any attempt to call the remisier or any other witnesses to testify as to who gave the plaintiff instructions to buy or sell the shares in question. Although the plaintiff's case revealed that one Diane Yeoh ('the remisier') was supposed to take instructions on the first defendant's account, the plaintiff's failure to call the remisier who was in charge of the share account was a grave defect in the plaintiff's case, which entitled the court to draw an adverse inference under s 114(g) of the Evidence Act 1950. The first defendant was not legally responsible for the losses arising from his trading account as there was no evidence of an express authorisation from the first defendant allowing the utilisation of his account by the third parties or the remisier. Therefore it was clear that the plaintiff had failed to satisfy its obligation to prove its case on a balance of probabilities (see para 15).

(2) The evidence of the plaintiff's main witness, the executive officer of the plaintiff's company, was inconsistent with the plaintiff's pleadings and all the contemporaneous documents tendered (see para 14(c)).

(3) The plaintiff failed to call relevant witnesses to enable the contract notes and contra statements to be marked as exhibits and admitted as admissible evidence. As such, the said contract notes and contra statements were inadmissible as evidence, and from a perusal of the totality of the evidence it was unclear whether the first defendant had placed orders for the purchase of the shares as alleged by the plaintiff (see para 14(d)).

[Bahasa Malaysia summary

Defendan pertama telah menandatangani borang permohonan untuk membuka akaun persendirian dengan plaintif untuk membolehkan dia menerima saham dalam Espirit Group Bhd ('Espirit'), saham-saham yang mana patut diberikan kepadanya sebagai pekerja Espirit. Plaintif mendakwa

bahawa defendan pertama telah melantiknya sebagai ejennya untuk jual beli saham-saham KLSE dan bahawa plaintif telah mengalami kerugian kontra sebanyak RM4,318,235.98 daripada pembelian dan pelepasan saham-saham untuk defendan pertama. Plaintif memulakan tindakan ini terhadap defendan pertama dan defendan kedua, penjaminnya, untuk kerugian-kerugian kontra ini dan faedah. Walau bagaimanapun, sebelum perbicaraan diteruskan plaintif menarik balik tuntutannya terhadap defendan kedua. Dalam pembelaannya defendan pertama berhujah bahawa dia hanya buka akaun dengan plaintif untuk menerima saham-saham dalam Espirit dan bahawa dia tidak pada bila-bila masa memasuki apa-apa kontrak dengan plaintif untuk membeli dan menjual apa-apa saham di KLSE. Dia juga menafikan memberi apa-apa arahan atau perintah-perintah kepada remisier plaintif atau ejen untuk membeli apa-apa saham untuknya dan menerima apa-apa nota kontrak, penyata-penyata kontra atau penyata akaun, yang plaintif selengarakan dihantar melalui pos kepadanya. Plaintif bergantung atas salinan surat bertarikh 19 November 1997 yang ditandatangani oleh defendan pertama memberikan kuasa kepada dua orang ('pihak ketiga') untuk mengguna akaun perniagaan defendan pertama tetapi defendan pertama menafikan menandatangani surat ini. Isu utama untuk penentuan dalam kes ini adalah sama ada plaintif telah atas imbangan kebarangkalian membuktikan bahawa defendan pertama telah memberikan kuasa atau mengarahkan ia untuk mengunakan akaun perniagaan yang dibuka dalam namanya untuk membeli saham-saham, yang mana adalah perkara tuntutan ini.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Sementara terdapat keterangan yang menunjukkan bahawa defendan pertama telah menandatangani borang permohonan untuk membuka akaun persendirian dengan plaintif untuk membolehkan dia menerima saham-saham dalam Espirit, ini adalah tidak mencukupi untuk memutuskan bahawa oleh itu dia berjanji keseluruhan liabiliti untuk pembelian dan jualan saham-saham yang dijanjikan oleh remisier atau pihak ketiga. Ini adalah kerana plaintif tidak memanggil atau tidak membuat apa-apa percubaan untuk memanggil remisier tersebut atau mana-mana saksi lain untuk memberi keterangan siapa yang memberi arahan-arahan kepada plaintif untuk membeli atau menjual saham-saham yang dipersoalkan. Walaupun kes plaintif menunjukkan bahawa seorang yang bernama Diane Yeoh ('remisier') yang sepatutnya mengambil arahan-arahan atas akaun defendan pertama, kegagalan plaintif untuk memangggil remisier yang mengendalikan akaun saham tersebut adalah kecacatan besar dalam kes plaintif, yang mana memberikan hak kepada mahkamah untuk membuatkan inferens bertentangan di bawah s 114(g) Akta Keterangan 1950. Defendan pertama tidak bertanggungjawab dari segi undang-undang untuk kerugian yang berbangkit daripada akaun perniagaannya kerana tidak

terdapat keterangan pemberian kuasa nyata daripada defendan pertama membenarkan penggunaan akaunnya oleh pihak ketiga atau remisier tersebut. Oleh itu ia adalah jelas bahawa plaintif telah gagal untuk memenuhi tanggungjawabnya untuk membuktikan kesnya atas imbangan kebarangkalian (lihat perenggan 15).

(2) Keterangan saksi utama plaintif, pegawai eksekutif syarikat plaintif, tidak konsisten dengan pliding plaintif dan kesemua dokumen-dokumen semasa yang ditenderkan (lihat perenggan 14(c)).

(3) Plaintif gagal untuk memanggil saksi relevan untuk membolehkan nota-nota kontrak dan penyata-penyata kontra ditanda sebagai ekshibit dan dimasukkan sebagai keterangan boleh diterima. Oleh itu, nota-nota kontrak dan penyata-penyata kontra tersebut tidak boleh diterima sebagai keterangan, dan daripada pemerhatian terhadap keseluruhan keterangan ia adalah tidak jelas sama ada defendan pertama telah membuat pesanan-pesanan untuk pembelian saham-saham yang didakwa oleh plaintif (lihat perenggan 14(d)).]

Notes

For cases on formation in general, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3712–3849.

For cases on failure to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 232–260.

For cases on admissibility of, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1283–1304.

For cases on witness in general, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2955–3244.

Cases referred to

Affin Bank Bhd v Joseph Thambirajah [2004] 6 CLJ 201, HC (refd)

Joseph Thambirajah v Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd) [2008] 2 MLJ 773, CA (refd)

Jupiter Securities Sdn Bhd v Amal @ Nur Amal binti Abdul Manaf [2001] MLJU 237, HC (refd)

Kurnia Insurance (M) Bhd v Nahizu Sdn Bhd (unreported) (refd)

Maybank Securities Sdn Bhd v Kassim Mahat [2008] 8 CLJ 715, HC (refd)

Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, FC (refd)

PB Securities Sdn Bhd v Justin Ong Kian Kuok [2007] 1 MLJ 153; [2006] 8 CLJ 337 (refd)

RHB Cathay Securities Pte Ltd v Ibrahim Khan and Other action [1999] 3 SLR 464 (refd)

Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1998] 1 MLJ 713, HC (refd)

Legislation referred to

Evidence Act 1950 ss 73A, 101(1), 114(g)

Asmaniza bt Abdullah (Faizul Hilmy with her) (WY Chan & Roy) for the plaintiff.

Alex De Silva (S Shamalah with her) (Bodipalar, Ponnudurai De Silva) for the defendant.

Suraya Othman J:

INTRODUCTION

[1] In this action, the plaintiff, Phileo Allied Securities Sdn Bhd makes a claim against the defendants, Yong Keong Sheng ('the first defendant') and Goh Chee Boon ('the second defendant') for contra losses arising from the purchase and disposal of shares namely MCL shares and Espirit Group Bhd shares listed on the Kuala Lumpur Stock Exchange ('KLSE'). The plaintiff's case against the defendants is for a principle sum of RM4,318,235.98 together with late payment charges amounting to RM4,614 and interest thereon at the rate of 13%pa on RM4,318 235.98 from 20 January 1998 until date of full realisation.

FACTS AND BACKGROUND

[2] Based on the plaintiff's statement of claim, the first defendant had opened an individual account with the plaintiff and Malaysian Central Depository Sdn Bhd ('MCD') on 20 November 1997, for the sale and purchase of shares at KLSE. The first defendant subsequently hired the plaintiff as his agent with regards to the sale and purchase of the shares at KLSE. In furtherance of the said transaction, the first defendant had entered into a series of contracts pertaining to the sale and purchase of shares at the KLSE which was conducted through the plaintiff. In addition to the above, the second defendant guaranteed and undertake to repay the plaintiff any sums of money due and owing by the first defendant together with interest, in relation to the sale and purchase of shares by the first defendant. This assurance was reflected in the letter of guarantee and undertaking dated 24 November 1997. Before the trial proceeded, the plaintiff withdrew its claim against the second defendant and this court accordingly struck out the plaintiff's action against the second defendant.

[3] The first defendant in his oral evidence stated that he did sign an application form to open an account with the plaintiff to enable him to receive shares in Espirit Group Bhd that was to be given to him as an employee under the employee share option scheme. The first defendant however maintains that he did not at any time enter into any contract with the plaintiff to buy and sell

any shares. He denies giving any instruction or order to the plaintiff's remisier, dealer, representative, employee or agent to purchase any shares for him. He further denies giving instructions or authorisation to anyone from the plaintiff's company or any third parties to buy and sell any shares on his behalf. He further stated he did not receive any contract notes, purchase orders, contra statements and statement of accounts which the plaintiff maintain were sent by post to him.

[4] In the course of this trial, the plaintiff called upon two witnesses to testify while the first defendant called only one witness. The plaintiff's and defendant's witnesses were as follows:

(a) PW1 — Norlela binti Hassan.

(b) PW2 — Salmi Haslina binti Mohd Salim.

(c) DW1 — Yong Keong Sheng.

THE PLAINTIFF'S CONTENTION

[5] Cik Asmaniza bt Abdullah, counsel for the plaintiff, argued that the first defendant had signed an application form and opened an account with the MCD to trade in shares. The first defendant subsequently agreed to appoint a person named Diana Yeoh Pek Hoon as his remisier to take instructions on his account. Cik Asmaniza argued that even though the first defendant denied giving any authorisation to Chew Kar Hooi and Gan Wei Luen ('third parties') to use his account to trade, the first defendant failed to prove that he did not give instructions to the said third parties. On this premise, Cik Asmaniza referred to the case of *PB Securities Sdn Bhd v Justin Ong Kian Kuok* [2007] 1 MLJ 153; [2006] 8 CLJ 337.

[6] Cik Asmaniza further argued that the first defendant must have given instructions to buy and sell the shares based on the contract notes, letters dated 13 January 1998 and 24 March 1998 from the second defendant to the plaintiff and Diana Yeoh's reply dated 19 January 1998 to the second defendant. Cik Asmaniza also submitted that there were no police reports made against the plaintiff, second defendant or third parties and there was absolutely no action taken by the first defendant to establish that the plaintiff had commited fraud in the opening of the account and its usage. In this regard, Cik Asmaniza submitted the case of *RHB Cathay Securities Pte Ltd v Ibrahim Khan and other action* [1999] 3 SLR 464 in support of her contention.

[7] Cik Asmaniza also submitted that the contract notes were sent to the first defendant based on the address stated in his application form (P1) and as such

submitted the first defendant would have received them. In this light, she referred to the case of *Affin Bank Bhd v Joseph Thambirajah* [2004] 6 CLJ 201 for support.

[8] She further submitted the case of *Maybank Securities Sdn Bhd v Kassim Mahat* [2008] 8 CLJ 715 which reiterates the decision by the court which held that the plaintiff is entitled to the benefit of s 73A of the Evidence Act 1950 in the interest of business efficiency even though the maker of the document was not called.

THE DEFENDANT'S CONTENTION

[9] In reply to the above submission, Encik Alex De Silva, counsel for the first defendant submitted that there was no direct evidence of who gave instructions to buy the shares and there is no evidence at all that the instructions came directly from the first defendant. Encik Alex De Silva referred to the case of *Joseph Thambirajah v Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd)* [2008] 2 MLJ 773 for support.

[10] Encik Alex De Silva also argued that the plaintiff failed to call Diana Yeoh Pek Hoon, the remisier who took instructions on the first defendant's account. The failure to call Diana Yeoh Pek Hoon entitles this court to draw and adverse inference under s 114(g) of the Evidence Act 1950. In this light, Encik Alex De Silva submitted the case of *Jupiter Securities Sdn Bhd v Amal @ Nur Amal binti Abdul Manaf* [2001] MLJU 237 in support of his contention.

[11] Encik Alex De Silva further submitted that the contract notes are inadmissible as evidence because they were marked as 'ID' at the trial. This was due to the plaintiff's failure to call relevant witnesses to enable these documents to be marked as exhibits and as such these documents are inadmissible evidence. Encik Alex De Silva relied on the case of *Kurnia Insurance (M) Berhad v Nahizu Sdn Bhd* (unreported case) in support.

[12] Encik Alex De Silva further argued that the plaintiff who asserts must prove in accordance with s 101(1) of the Evidence Act 1950. In this case the plaintiff has even failed to assert who gave instructions let alone prove the assertions. On this point, counsel for the defendant referred to the following cases: *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 and *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1998] 1 MLJ 713 in

support.

ISSUES TO BE TRIED

[13] Parties agreed the issues to be tried are:

(a) did the first defendant give instructions himself or did he authorize any third parties to use the share trading account opened in his name to buy the shares concerned; and

(b) has the plaintiff discharge the burden of proving its case by calling all relevant witnesses and producing relevant evidence to prove the above.

FINDINGS OF THE COURT

[14] I have heard the evidence, read the documents, exhibits and submissions of both the parties. Both learned counsel for the plaintiff and the first defendant have dealt with the evidence and the law in their submissions in detail. After having given much consideration to the said submissions of the learned counsels, my findings are as follows:

(a) The central issue falls on whether the first defendant gave instructions or authorisation to use the share trading account opened in his name to buy the said shares. PW1 the executive officer in the plaintiff's company was the main witness for the plaintiff. In the instant case, PW1 gave evidence that there was instruction given by the first defendant to authorise two persons known as Chew Kar Hooi and Gan Wei Luen to deal with the first defendant's account. However she was unable to produce any evidence to substantiate this contention. PW1 had relied on a letter dated 19 November 1997 purportedly signed by the first defendant authorising the abovementioned persons to utilise his trading account. The first defendant has denied signing this letter. No witnesses were called by the plaintiff to testify as who gave instructions to buy or sell the said shares. The plaintiff failed to produce the original of the letter. There is no explanation whatsoever of why the original letter was not produced. PW1 also has no personal knowledge of the letter or the whole transaction of buying and selling of the said shares. In the instant case, the letter was marked as 'ID4' during the trial and it can only be referred to for identification purpose, therefore it cannot be admitted as evidence. It is trite law that documents marked as 'ID' do not form part of the court's records. Support for the principle is found in the case of *Joseph Thambirajah v Bank Buruh (M) Bhd* [2008] 2 MLJ 773. In this case, the Court of Appeal held:

> We are of the view that the third letter of demand cannot be considered at all because it was not tendered in court by any witness of respondent. It was only an identification document ('ID') in the non-agreed bundle and was never converted to a court exhibit.

(b) The plaintiff's case revealed that one Diana Yeoh Pek Hoon was the remisier who was supposed to take instructions on the first defendant's account. However, Diana Yeoh Pek Hoon was not called as a witness. In the instant case, PW1 admitted that the plaintiff knew where Diana Yeoh Pek Hoon lived but there was no explanation as to why she was not called to give evidence. Furthermore, no subpoena was issued to call her as a witness. PW1 also admitted that no attempts were made to contact Diana Yeoh Pek Hoon even though the plaintiff knew where she lived. I agree with the submission of counsel for the first defendant Encik Alex De Silva that the plaintiff's failure to call the remisier who was in charge of the share account is a grave defect in the plaintiff's case which entitles this court to drawn and adverse inference under s 114(g) of the Evidence Act 1950. The plaintiff thus cannot prove that the shares were bought pursuant to instructions from the first defendant. As a result, it cannot be proven who gave the instructions and who received the instructions that formed the contract for the purchase of the said shares. This court would agree with the views expressed by Ramly bin Haji Ali J (as he then was) in the case of *Jupiter Securities Sdn Bhd v Amal @ Nur Amal binti Abdul Manaf*:

> Oleh itu, perlu ditegaskan di dalam konteks ini, seorang wakil peniaga atau remisier adalah merupakan wakil atau agen kepada syarikat broker saham dan bukannya wakil atau ejen kepada seorang klien. Ini bermakna, seperti di dalam kes ini, segala urusan jual beli yang dilakukan oleh defendan (termasuk urusan pembukaan akaun) adalah dilakukan melalui Jamal, sebagai wakil kepada syarikat plaintif. Jamal adalah merupakan orang atau saksi yang paling penting bagi plaintif untuk membuktikan bahawa akaun telah dibuka dengan sah oleh defendan dan juga membuktikan semua urusan jual beli atau arahan-arahan jual beli yang diplidkan oleh plaintif di dalam pernyataan tuntutannya. Malangnya Jamal tidak dipanggil sebagai saksi oleh plaintif.

(c) PW1 was the main witness for the plaintiff. Her evidence was inconsistent with the plaintiff's pleading and all the contemporaneous documents tendered. She was extensively cross-examined by the defence and the defendant's case was put to her in all aspects. She initially testified that she had personal knowledge of the said transactions. However in cross-examination, it became obvious that she did not have any personal knowledge of the said transactions. At first, PW1 testified that RM834,000 was forfeited from a security deposit of the remisier to reduce the losses suffered in the account. When it was pointed out to

PW1 that this same sum of RM834,000 was said to be an 'advance deposit' paid into the account as stated at para 6 of an affidavit affirmed by Yang Kamardin @ Din bin Mohd Hassan on 30 July 1998, PW1 conceded she had no knowledge of this sum of RM834,000. What could be gathered from PW1's evidence is merely from the following evidence of PW1 during re-examination:

> Saya tidak mempunyai pengetahuan samada RM834.000.00 adalah merupakan cengkaman pendahuluan atau deposit sekuriti remisier.

(d) The plaintiff had failed to call relevant witnesses to enable the contract notes to be marked as exhibits and thus admitted as admissible evidence. PW1 works in the credit control division. She confirmed in cross-examination that it was the information system department that dealt with producing the contract notes. No one from this department was called. It was also clear that the person who accepted the orders that formed the transactions, which is the remisier was also not called. PW1 could not explain where the carbon copies of the contract notes were kept. PW1 during cross–examination admitted that she was not involved in the printing and posting of the contract notes and contra statements. She also testified that she has no personal knowledge of the said transactions. She testified as follows:

> Saya mengesahkan bahawa saya tidak terlibat di dalam printing dan posting contract notes dan Penyata Kontra, mukasurat 22 sehingga 45 dan 49 sehingga 54 CBD.

Saya mengesahkan saya tidak mempunyai pengetahuan peribadi.

In the instant case, the contract notes and contra statements were marked as 'ID' at the trial and therefore are inadmissible as evidence. A perusal of the totality of PW1's evidence suggests that it was unclear whether the first defendant did indeed place orders for the purchase of the said shares as alleged by the plaintiff.

(e) I agree with the plaintiff's submission that the plaintiff has failed to prove that the first defendant gave instructions to purchase the said shares or that the first defendant gave authorisation to the plaintiff to allow Cher Kar Hooi and Gan Wei Luen to use his account in order to purchase the said shares. Therefore it is crystal clear that the plaintiff has failed to satisfy its obligation to prove its case. In this regard, I am guided by the case of *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd*, where the court held:

> Under s 101(1) of the Evidence Act 1950, whoever desires the court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exists. In other words, the

plaintiff must prove such facts as the plaintiff desires the court to give judgment as to its right to claim against the defendant or the defendant's liability to pay the plaintiff. The burden of proof is on the plaintiff: s 101(2). In order to succeed here, the plaintiff must prove its claim affirmatively.

CONCLUSION

[15] In order to conclude that the first defendant is to be held solely responsible for the transaction of selling and buying the said shares, there should be ample evidence before the court to justify the conclusion that there was express authorisation from the first defendant allowing the utilisation of his account by the third parties or the remisier, with his full knowledge that he would be legally responsible for losses arising therefrom. However, there is inadequate evidence before this court to enable it to conclude as such. While there is evidence to show that the first defendant did sign an application form to open an individual account to enable him to receive shares in Espirit Group Bhd that was to be given to him as an employee under the employee share option scheme, it is insufficient to conclude that he therefore undertook the entire liability for the purchase and sale of the said shares undertaken by the remisier or the third parties. This is so since the plaintiff did not call or made any attempt whatsoever to call the remisier, Diana Yeoh Pek Hoon or any person with personal knowledge on this matter. Therefore the answers to both the issues are in the negative.

[16] For the foregoing reasons, I am unable to conclude that the plaintiff has proved its case on a balance of probabilities. Accordingly I am left with no option but to dismiss the plaintiff's claim with costs.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan